

**Kimtruss Corporation and Local Union No. 3-433
of the International Woodworkers of America,
AFL-CIO.** Cases 32-CA-11176 and 32-CA-
11363

November 25, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND OVIATT

On May 1, 1991, Administrative Law Judge Michael D. Stevenson issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed cross-exceptions, a brief in support, and an answering brief to the General Counsel's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The complaint in Case 32-CA-11176 alleges, *inter alia*, that the Respondent violated Section 8(a)(1) by, on May 31, 1990, in anticipation of a strike by its employees to begin about June 1, 1990, announcing a bonus that would not be paid to employees not working June 1 through 8, 1990. The complaint further alleges that the Respondent violated Section 8(a)(3) by, on June 8, 1990, paying the bonus to otherwise eligible nonstriking employees and denying the bonus to otherwise eligible striking employees. The judge found both the 8(a)(1) and (3) violations sought by the General Counsel.¹ The Respondent excepts, contending, *inter alia*, that, in announcing and later paying the bonus, it was simply exercising its legal right to implement its last offer, including a validly negotiated bonus, and that the bonus constituted a lawful lump-sum payment of a future wage increase. For reasons set forth below, we agree with the Respondent. Accordingly, we find no unfair labor practices in this proceeding and that the strike at all times remained an economic strike. We shall therefore dismiss the complaint in its entirety.

The relevant facts are as follows. The Respondent, a California corporation, is engaged in the manufacture and nonretail sale of wooden trusses and has an office and place of business in Madera, California. About 2-1/2 years prior to May 31, 1990,² the Respondent purchased the business in question, recognized the Union,

and adopted the existing collective-bargaining agreement, which expired on May 31, 1990. The Respondent and the Union agreed to meet and negotiate a new collective-bargaining agreement on May 23, 24, and 25. Representing the Union were, *inter alia*, Chief Negotiator Blaylock and Business Agent Bernard. Representing the Respondent were, *inter alia*, Attorney Pepe and Plant Manager Jackson. On May 25, the parties reached a tentative agreement which modified the previous collective-bargaining agreement to the extent that, *inter alia*, it provided that,

Employees pay w/e [week ending] 6/8/90 6 mos. or more

\$300 bonus 6 mos. to 30 days \$125 [bonus]³
6/1/91 15¢ Employees 27 mos. 36 mos.—
36 mos. over scale
6/1/92 15¢ Employees 27 mos. 36 mos.—
36 mos. over scale

Termination Date 3/1/93

Union and Union bargaining committee will recommend agreement subject to ratification by Union members.

Also on May 25, when the Union learned that too many employees were absent and could not vote, the parties agreed to schedule a ratification vote for May 31. On that date, Bernard, in discussing the tentative agreement with unit employees prior to the vote, stated, *inter alia*, that if an employee voted "no" on the tentative agreement, it might be tantamount to a vote to strike. The employees voted to reject the tentative agreement.

Bernard reported the contract rejection to Union Chief Negotiator Blaylock. Blaylock then telephoned Plant Manager Jackson who, upon hearing that the employees had rejected the contract, expressed surprise. Blaylock indicated that he, too, was surprised. Next, Blaylock reported the contract rejection to the Respondent's attorney, Pepe. Pepe stated that the Respondent would be implementing its last offer the next day. Blaylock responded, "[f]ine, and we know what we have to do." Both the Respondent and the Union spent the remainder of the day preparing for the strike which began on June 1.

According to Pepe, after he learned of the vote to reject the contract, he advised Jackson that

We ought to put up a notice to the employees telling them that we are going to implement our last offer and get it out to them that afternoon if at all possible and he said he'd take care of it.

After talking to Pepe, Jackson called the plant and dictated a statement to his secretary, Harvey. After Har-

¹ The complaint in Case 32-CA-11363 alleges, *inter alia*, that the Respondent's unfair labor practices caused and/or prolonged the strike begun on June 1, 1990. The judge found that the strike, which at its inception was an economic strike, was not prolonged by the Respondent's unfair labor practices.

² All subsequent dates are in 1990 unless noted otherwise.

³ The bonus was given in lieu of an hourly wage rate increase during the first year of the contract.

vey typed the statement, she “fax’d” it to Jackson for his review. Jackson reviewed it, made no changes to it, and telephoned Harvey with instructions to mail a copy to every unit employee and to post the notice at various places around the plant. The notice stated, *inter alia*,

Kimtruss Corporation will implement the last offer as of June 1, 1990. Current wages, hours and conditions plus bargaining agreements. . . .

All employees not working June 1, 1990 through [sic] June 8, 1990 will not be paid the signing bonus.

By the late afternoon of May 31, the notice had been posted at the plant, seen by swing shift employees, and reported by them to Union Business Agent Bernard who had come to the plant to begin strike preparations for the next day. Bernard telephoned Macrae, a vice president of the International, and informed him of the exact wording of the notice. Macrae informed Bernard that the notice did not reflect the Respondent’s final offer and, in his opinion, the Respondent had committed an unfair labor practice. Following Macrae’s instructions, Bernard wrote, “Unfair Labor Practice” on the picket signs and informed the strikers of the alleged unfair labor practice.

On June 1, the employees began the strike. On June 8, the Respondent paid the bonus only to nonstriking employees. On June 14, the Employer began to hire permanent replacements.

As noted above, the judge found that the Respondent violated Section 8(a)(1) by posting the notice and Section 8(a)(3) by paying the bonus. Regarding the 8(a)(1) finding, the judge noted that, at the hearing, the General Counsel took the position that “the [Respondent] implemented what it said it would implement at the table.”⁴ The judge further noted that, although the General Counsel challenged only the posting of the notice and the notification of employees as a threat or inducement to employees not to engage in a strike, the Charging Party Union contended that what was negotiated at the bargaining table was different from the content of the posted notice.

In finding the 8(a)(1) violation, the judge appears to have considered both the Union’s and the General Counsel’s theories of the case. The judge found that the Respondent had violated Section 8(a)(1) under both theories. As a preliminary matter, we agree with the Respondent that the judge improperly considered the Union’s theory. In this regard, we note, as did the judge, that the Respondent was not charged with making any unilateral changes; the General Counsel’s the-

ory of the case acknowledges that “the [Respondent] implemented what it said it would implement at the table.” It is settled that a charging party cannot enlarge upon or change the General Counsel’s theory. See *Penntech Papers*, 263 NLRB 264, 265 (1982).

Having determined that the judge improperly considered the Union’s theory as at variance from the General Counsel’s, we turn to consider the judge’s finding that under the General Counsel’s theory, the Respondent violated Section 8(a)(1). In this regard, the General Counsel contended, and the judge found, that the notice was intended to deter employees from striking. In so finding, the judge noted that although Plant Manager Jackson had deemed it urgent to get the notice to the employees—apparently because the tentative agreement resolved issues such as hourly pay raises and health insurance for dependents—only the “so-called ‘signing bonus’ was highlighted [in the notice], and the terminology was concededly wrong.” The judge also cited the Respondent’s failure to justify its requirement that strikers actually work for the week of June 1 through 8. He thus found that the Respondent violated the Act “by posting the notice at a time when it knew the Union was about to go on strike.” The Respondent contends that it had a legitimate business justification for both the timing of the notice and conditioning the bonus on working the week ending June 8. We find merit in the Respondent’s contentions.

Regarding the timing of the notice, we find that evidence is lacking that the Respondent timed the notice in order to deter the strike. The ratification vote took place by agreement on the afternoon of May 31, the day the collective-bargaining agreement expired. It was necessary for the Respondent, once it learned that the employees had rejected the tentative agreement, to issue the notice of its decision to implement its final offer immediately if it was to inform the employees in advance of the terms and conditions under which they would be working on June 1. Under the circumstances, we find that the parties’ agreement regarding the date of the ratification vote led to the timing of the notice. That the Union planned a strike for June 1 does not, by itself, warrant the conclusion that the notice was a response to the planned strike and that by posting the notice on May 31, the Respondent violated the Act.

We further find that conditioning receipt of the bonus on working June 1 through 8 does not establish that the notice was intended to deter the strike. We do not adopt the judge’s conclusion to the contrary. According to the General Counsel’s theory, which the judge accepted and considered, this condition was negotiated by the parties on May 24–25 and was contained in the tentative agreement. Further, there is no contention that, at the time the tentative agreement was reached, any party anticipated a strike; in fact, both sides were confident of ratification. The Respondent

⁴ The General Counsel did not allege that the notice posted by the Respondent on May 31, which conditioned the bonus on working the week of June 1 through 8, differed from the Respondent’s final offer.

was simply posting a notice announcing implementation of its final offer. On the facts of this case, we can find nothing violative of the Act in the Respondent's decision to "highlight" the previously agreed condition that employees work the week of June 1 through 8.

Having found that the Respondent did not violate Section 8(a)(1) by posting the notice, we now turn to the judge's finding that the payment of the bonus only to nonstrikers violated Section 8(a)(3). The Respondent excepts to this finding, contending that the judge, although he accepted the General Counsel's position that the Respondent "implemented what it said it would implement at the table," erred in concluding that payment of the bonus was an exception to the rule permitting implementation of final wage proposals at impasse. We agree. In this regard, it is well established that an employer, in implementing its final offer at impasse, may implement its wage increase proposals and pay the wage increase to employees who cross the picket line and to employee replacements. The General Counsel does not allege an 8(a)(5) violation in the payment of the bonus. In the instant case, it is undisputed that the bonus, computed based on employee compensation, was in lieu of a wage increase. Indeed, it had the Union's support and was a product of negotiation even though ultimately rejected by the Employer. The bonus was thus an accelerated wage increase; it was compensation for services to be performed during the coming year. As such, the bonus constituted wages. *Niles-Bement Pond Co.*, 97 NLRB 165 (1951), *enfd.* 199 F.2d 713 (2d Cir. 1952).⁵ Because the Respondent's payment of the bonus constituted an implementation of a wage increase which had been bargained to lawful impasse, the Respondent did not violate the Act by paying the bonus.⁶

Finally, in light of the above findings that the Respondent did not violate Section 8(a)(1) or (3), we agree with the judge that the strikers are economic strikers who, if they unconditionally offer to return to work, are entitled to immediate reinstatement if they have not been permanently replaced by the Respondent.

⁵In that case, the Board held that a Christmas bonus, given as compensation for services performed during the preceding year, constituted wages.

⁶The judge's reliance on such cases as *Soule Glass v. NLRB*, 652 F.2d 1055 (1st Cir. 1981), *NLRB v. Swedish Hospital Medical Center*, 619 F.2d 33 (9th Cir. 1980), *NLRB v. Frick Co.*, 397 F.2d 956 (3d Cir. 1968), and *Aero-Motive Mfg. Co.*, 195 NLRB 790 (1972), *enfd.* 475 F.2d 27 (6th Cir. 1973), is misplaced because in those cases the Board held that the employer violated the Act by unilaterally awarding benefits to nonstrikers or withholding earned benefits from strikers. In the instant case, however, the strikers did not forfeit an earned benefit and the bonus was lawfully negotiated as a form of a wage increase to be paid to employees who worked the week of June 1 through 8.

ORDER

The complaint is dismissed.

Barbara D. Davison, for the General Counsel.

Renee P. Turkell (O'Melveny and Myers), of Los Angeles, California, for the Employer.

Rosemarie Cordello (Willner, Zabinsky, Dorsay & Cordello), of Portland, Oregon, for the Union.

DECISION

STATEMENT OF THE CASE

MICHAEL D. STEVENSON, Administrative Law Judge. This case was tried before me at Fresno, California, on November 28, 1990,¹ pursuant to complaints issued by the Regional Director for the National Labor Relations Board for Region 32 on July 26 (Case 32-CA-11176), on October 11 (Case 32-CA-11363) and on August 20 (Case 32-CB-3470) and which are based on charges filed by Local Union No. 3-433 of the International Woodworkers of America, AFL-CIO (Cases 32-CA-11176 and 32-CA-11363) and by Kimtruss Corporation (Case 32-CB-3470) (called Union and Employer, respectively) on June 6 and first-amended on June 14 (32-CA-11176), on August 27 (Case 32-CA-11363) and on June 18 (Case 32-CB-3470). Complaints Cases 32-CA-11176 and 32-CA-11363 allege that the Employer has engaged in certain violations of Section 8(a)(1) and (3) of the National Labor Relations Act, (the Act). Complaint Case 32-CB-3470 alleges that the Union has engaged in certain violations of Section 8(b)(1)(A) and (3) of the Act.

Issues

(1) Whether the Employer paid a bonus to eligible non-strikers and denied a bonus to eligible strikers for the purpose of restraining and coercing the strikers in the exercise of their rights pursuant to Section 7 of the Act.

(2) If the Employer committed the unfair labor practice in (1) above, did that unfair labor practice cause and/or prolong the strike engaged in by the employer's employees.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and to cross-examine witnesses, to argue orally, and to file briefs. Briefs, which have been carefully considered, were filed on behalf of General Counsel, Charging Party, and Respondent.²

On the entire record of the case, and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. RESPONDENT'S BUSINESS

The Employer admits that it is a California corporation engaged in the manufacture and nonretail sale of wooden trusses and has an office and place of business located in Madera,

¹All dates herein refer to 1990 unless otherwise indicated.

²General Counsel's motion to strike a portion of Respondent's brief is granted on the grounds that appendix I was not made part of the formal record. *Ideal Dyeing Co.*, 300 NLRB 303 fn. 1 (1990); *Mademoiselle Knitwear*, 297 NLRB 272 fn. 1 (1989); *Coppinger Machinery Service*, 279 NLRB 609 fn. 1 (1986). Because appendix I is not properly part of Respondent's brief, LL. 6-11 of p. 17 of Respondent's brief based on appendix I are also struck.

California. It further admits that during the past year, in the course and conduct of its business, it has purchased and received goods or materials valued in excess of \$50,000 from suppliers located outside the State of California. Accordingly it admits, and I find, that it is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Employer admits, and I find, that Local Union No. 3-433 of the International Woodworkers of America, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

1. Background on various settlement agreements

Before hearing of the instant case began, General Counsel entered into all party partial settlements of certain allegations from complaints in Cases 32-CA-11176 and 32-CB-3470 (G.C. Exhs. 2(a), (b), and (c), 3(a), (b), and (c)). Thereafter, once the hearing had been completed, General Counsel entered into a settlement agreement with the Union resolving all remaining allegations in Case 32-CB-3470. On February 1, 1990, over the Employer's objection, I granted the General Counsel's motion requesting me to approve this settlement agreement (JD(SF)-8-91)). The Employer's exceptions to my written decision granting the General Counsel's motion are now pending before the Board. In light of the above, in this decision I will refer to the Employer as Respondent.

2. Negotiations for a new agreement

About 2-1/2 years prior to May 31, Respondent purchased the business in question, recognized the Union and adopted the existing collective-bargaining agreement which expired on May 31. Believing it would not be difficult to negotiate a new agreement, the parties agreed to meet and negotiate on May 23, 24, and 25. Representing the Union were Chief Negotiator Glen Blaylock assisted by Union Business Agents Linda Bernard and Val Kerry and a four-man employee negotiating committee. Representing the Employer were Attorney Stephen Pepe, then Plant Manager Bill Jackson, and Production Supervisor Mark Williams. Blaylock, Bernard, Pepe, and Jackson all appeared as witnesses and in some cases also appeared as adverse witnesses for opposing counsel.

On the third day of negotiations, tentative agreement was reached. The parties agreed to accept the old agreement except insofar as certain modifications were agreed to. The modifications were written by Pepe and read into the record:

Tentative Agreement 5/25/90

Parties contract expiring May 31, 1990 except as modified as follows:

Tentative Agreements of May 23, 24, 1990

Art. XXIII Group Insurance—Add

Co. pay employee & 50% of dependent

Delete last sentence final paragraph

If Co. is advised of significant increase, Co. will advise Union for their input & suggestions.

Wages

Employees pay w/e [week ending] 6/8/90 6 mos. or more

\$300 bonus 6 mos. to 30 days \$125 [bonus]

6/1/91 15¢ Employees 27 mos. 36 mos.—36 mos. over scale

6/1/92 15¢ Employees 27 mos. 36 mos.—36 mos. over scale

Termination Date 3/1/93

Union and Union bargaining committee will recommend agreement subject to ratification by Union members.

Kimtruss	Intl. Woodworkers of Am.
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/s/ Bill Jackson

/s/ Glenn Blaylock

[G.C. Exh. 4, Tr. pp. 331-332.]

At first the parties discussed a ratification vote for the afternoon of May 25. Respondent agreed to assist with facilities and time off for employees to vote. When the Union learned that too many employees were absent and couldn't vote with only a few hours notices, the parties agreed to schedule the ratification vote for May 31.

3. Ratification vote and aftermath

On May 31, Blaylock was not present, but Bernard appeared to discuss the tentative agreement with unit employees prior to the vote. During discussion of the pros and cons of the tentative agreement, Bernard told employees that while the agreement was the best they could expect under the circumstances, if she had to vote, she wouldn't vote to accept it, and that it was not a contract, she could work under.³ After additional discussion, employees voted to reject the tentative agreement by a vote of about 2 to 1.

Bernard reported the results of the vote by telephone to Blaylock who then called plant manager Jackson. Like Blaylock, Jackson had been so confident of ratification, he had not been present for the vote. Instead, he was in Irvine, California at Company headquarters. Upon hearing the results from Blaylock, Jackson expressed surprise. Blaylock testified he also talked to a company official named Ed Bennett, who was Respondent's credit manager at the time. Blaylock claimed to have met Bennett at a prearbitration meeting some time before this conversation, but this is unlikely. Blaylock also claimed to have asked Bennett, who had no responsibility for labor relations (R. Exh. 5) for additional negotiations. Bennett is alleged to have said that "[the tentative agreement was the best the company had, and it looks like you are on strike." Bennett, now retired and supposedly living in Arizona, did not testify in this case. A short time later, Blaylock reported the contract rejection to Pepe who stated the Company would be implementing its last and final offer the next day. To this Blaylock, responded "fine, and we know what we have to do." Then both sides used the

³ Bernard added that if an employee voted "no" on the tentative agreement, it might be tantamount to a vote to strike.

remainder of the day and evening to prepare for the strike which began on June 1.

After Pepe learned of the vote to reject, he talked to Jackson by phone. According to Pepe, on May 31, he merely advised Jackson,

We ought to put up a notice to the employees telling them that we are going to implement our last offer and get it out to them that afternoon if at all possible and he said he'd take care of it.

[Tr. pp. 176, 329.]

After talking to Pepe, Jackson called back to the plant and dictated a short statement to his secretary, Joyce Harvey, who was in the hearing room, but not called as a witness (Tr. p. 280). After Harvey typed the statement, she "fax'd" it to Jackson, as he had requested, for his review (R. Exh. 6). Apparently satisfied, Jackson made no changes to it, and called Harvey back with instructions to mail a copy to each and every bargaining unit employee and to post the notice at various places in and around the plant. The notice reads as follows:

May 31, 1990

To All Employees:

Kimtruss Corporation will implement the last offer as of June 1, 1990. Current wages, hours and conditions plus bargaining agreements. With the exception of union security, union dues check off and grievance procedures.

All employees not working June 1, 1990 trough [sic] June 8, 1990 will not be paid the signing bonus.

Kimtruss Corporation

[G.C. Exh. 5]

According to Jackson, he didn't confer with anyone between receiving the "Fax" copy and telling Harvey to send it out. As to the terminology, "signing bonus," Jackson testified [he screwed up] and didn't "know why it got in there" (Tr. p. 266). In fact, Jackson testified he was not familiar with the term and never even heard the term before (Tr. p. 271). As to what Jackson meant by the terminology, he testified that he really didn't know.⁴ Jackson also testified that the entire second sentence in the notice was unnecessary (Tr. pp. 276, 278).

According to Pepe, a "signing bonus" is used to indicate that the employees don't get the bonus unless the contract is ratified "when you get near the end [of negotiations] and the Union wants a little more money but you don't want to put it in the wage rate, you'll offer a signing bonus of 50 or 100 bucks if the contract is ratified to give them an extra incentive to ratify the contract" (Tr. p. 330). Flatly denying that the bonus in issue was a "signing bonus" (Tr. p. 309), Pepe, like Jackson, could not explain the use of that terminology in the notice. Pepe testified that during negotiations, he corrected Blaylock who referred to the bonus as a "signing bonus." To this Pepe allegedly said, no, the [bonus] is for employees who get paid or work the week ending June 8, 1990 (Tr. p. 309).

⁴ Jackson provided his initial handwritten draft of the notice, which does not contain the words "signing bonus" (R. Exh. 7).

By late afternoon of May 31, the notice referred to above had been posted at the plant, seen by swing shift employees, and reported by them to Bernard who had come to the plant to begin strike preparations for the next day. Bernard, in turn called General Counsel witness, Chuck Macrae, a vice president of the International Woodworker's of America to inform him of the notice, and of its exact wording. Macrae told Bernard that what was on the notice was not the company's final offer and in his opinion, the company had committed an unfair labor practice. Following Macrae's instructions, Bernard wrote "Unfair Labor Practice" on the picket signs and informed the strikers of the alleged unfair labor practice.

Respondent called a witness named James Vanhorn, a member of the Union, a member of the employee negotiating committee, and a striking employee. While a picket captain and in his role as a spokesman for the Union, Vanhorn told local reporters on or about June 1, that strikers felt that a one-time bonus of \$300 and \$.15-hour raise for 2 years was not sufficient. Vanhorn added that strikers also objected to changing the contract's expiration date from June to March (R. Exh. 3).⁵ Complaining only about the economic and non-economic proposals contained in the tentative agreement, Vanhorn told reporters, "That's why we weren't inside. That's why the contract was turned down" (Tr. p. 239).

4. Poststrike negotiations seeking new agreement and strike settlement

After the strike began on June 1, the parties met on several occasions. So, too, did union officials meet with strikers.

a. June 11 meeting

On or about June 11, representatives of each side met with a Federal mediator named Allen. At this time, Pepe served notice on Blaylock that if the strike was not settled by June 14, Respondent would begin to hire permanent replacements. A letter to that effect was sent by mail from Jackson to Blaylock (G.C. Exh. 6). Pepe offered to settle for the employer's final offer, except for the bonus, the qualifying time for which allegedly had expired. That evening Bernard and Blaylock met with employees to inform them of Pepe's remarks. Respondent's alleged unfair labor practice was also discussed. Strikers voted to remain on strike.

On July 25, union representatives and strikers again met to discuss issues arising out of the strike. This time, Bernard and Blaylock had received advice from union attorneys to document the unfair labor practice which allegedly motivated strikers. Acting on this advice, strikers voted on and passed a lengthy resolution, affirming the view of the Union's leadership that the strike then in progress was an unfair labor practice strike (G.C. Exh. 7).

On August 20, Respondent and union officials again met with the mediator to discuss resolution of the strike. This time the parties could not agree as to the fate of the permanent strike replacements. Macrae and Blaylock insisted that they be terminated to make room for returning strikers. This Pepe refused to do, claiming Respondent would be liable to a lawsuit from the permanent replacements if they were terminated after being promised their jobs were secure. Again

⁵ R. Exh. 4, another newspaper article purporting to quote Vanhorn was refused and is included in the admitted exhibits by mistake.

Pepe reiterated that Respondent's final proposal was still on the table except for the bonus.

B. Analysis and Conclusions

1. Respondent's implementation of its last and final offer and decision on unfair labor practices

As noted above, after the Union rejected the tentative agreement, Respondent implemented its last and final offer, effective June 1. This occurred after the parties had bargained for 3 days. Both the Board and the courts have held that where both sides have bargained in good faith and been unable to resolve one or more key issues and where there are no definite plans for further efforts to break the deadlock, the Board is warranted—and perhaps even required—to make a determination that an impasse existed. *Teamsters Local 745 v. NLRB*, 355 F.2d 842, 845 (D.C. Cir. 1966). See also *Lapham Hickey Steel Corp. v. NLRB*, 904 F.2d 1180, 1185 (7th Cir. 1990), and *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967).

In the instant case, I am not called upon to determine whether the parties were at impasse after the tentative agreement was rejected. I assume impasse so that Respondent was privileged to implement its last and final offer. That is, Respondent is permitted to make unilateral changes in conditions of employment, but only as to matters that have been previously offered to the Union. See *Louisiana Dock Co. v. NLRB*, 909 F.2d 281, 288 (7th Cir. 1990). To put the rule in slightly different terminology, an employer is free to institute unilateral changes [after impasse] so long as they are not “substantially different from, or greater than, any which the Employer has proposed during the negotiations” *NLRB v. Crompton-Highland Mills*, 337 U.S. 217, 225 (1949).

During the hearing, General Counsel took the position that the “Employer implemented what it had said it would implement at the table.” General Counsel challenges only the posting of the notice and the notification of employees as a threat or inducement to employees not to engage in a strike (Tr. pp. 300–301). The Union, on the other hand, took the position that what was negotiated at the bargaining table was different from the content of the posted notice (Tr. p. 301).

As I am not called on to determine whether impasse existed, so too I am not called upon to determine whether any unlawful unilateral changes were made as Respondent is not charged with violating Section 8(a)(5) of the Act. Nevertheless, I agree with the Union's position, as further explained in its brief, page 7, that Respondent changed its bonus announcement from what was discussed at the bargaining table.

In the facts, I have recited both that which was agreed to by the parties on May 25, as written by Pepe and as read into the record by him from his personal handwritten notes of the tentative agreement (G.C. Exh. 4), and the notice posted by order of Jackson (G.C. Exh. 5).

Jackson now expresses regret at telling employees that “all employees not working June 1 through 8, 1990, will not be paid the signing bonus.” He fails to give a coherent account of how the terminology “signing bonus” happened to be used. A “signing bonus,” according to Pepe, is used to indicate that the employees don't get the bonus unless the contract is ratified (Tr. p. 330). Assuming a valid definition of the term, I find that employees could reasonably interpret the notice to say that because employees failed to ratify the

tentative agreement and were then prepared to strike, their right to strike was being challenged by the threat to withhold the bonus.

In *Schenk Packing Co.*, 301 NLRB 487 (1991), Respondent gave all its actively employed workers—i.e., those who were not locked out—a bonus package consisting of a \$500 check and a written note awarding them an extra week of vacation. Although occurring in the context of an unlawful lockout, these circumstances are somewhat analogous to a situation in which an employer, following a strike by unit employees, decides to grant benefits to its employees who worked during the strike, including those unit employees who chose to cross the picket line and return to work, while withholding such benefits from those who engaged in the strike. The Board held that:

In the appropriate circumstances, the Board has found that conduct of this kind violates Section 8(a)(1) because of its impact on employees' rights to engage in protected activity, see, e.g., *Desert Inn Country Club*, 282 NLRB 667, 668 (1987); *Rubatex Corp.*, 235 NLRB 833, 835 (1978), enfd. 601 F.2d 147 (4th Cir. 1979); *Swedish Hospital Medical Center*, 232 NLRB 16 (1977), reconsidered sua sponte 238 NLRB 1087 fn. 2 (1978), enfd. in relevant part 619 F.2d 33 (9th Cir. 1980); *Aero-Motive Mfg. Co.*, 195 NLRB 790, 792 (1972), enfd. 475 F.2d 27 (6th Cir. 1973). [301 NLRB at 490.]

I find that by conditioning the grant of the bonus payment on not striking on June 1 through 8, Respondent has interfered with and coerced its employees in the exercise of rights guaranteed by Section 7 of the Act, i.e., the right to strike.

In the alternative, I assume in apparent agreement with General Counsel, that Respondent did not change its proposal from what it announced at the bargaining table. According to Pepe, the bonus was purely a future wage increase much like any other kind of wages.⁶ Pepe also testified he made it clear to union representatives that for employees to qualify for the bonus, it was necessary for them to work or be paid for the week June 1 through 8. In rebuttal, Blaylock was called back to say he understood that in order to receive the bonus, it was only necessary to be employed by Blaylock and to be paid on June 8, the normal payday.

It is unnecessary to resolve this conflict nor to determine whether the parol evidence rule applies to the issue⁷ nor to determine whether, if there is an ambiguity in the tentative agreement, did Respondent cause or create it so as to be responsible for its consequences.⁸ Instead I find in the context of this case, the notice was intended to deter employees from striking.

Thus, in agreement with General Counsel, I note the urgency described by Jackson to get the notice to employees. The reason for this urgency is apparent when one considers that in reaching a tentative agreement, negotiators resolved

⁶Respondent held back a week of pay so that wages being paid on June 8 were for work performed the previous week.

⁷The exclusion of parol evidence concerning a signed written document does not apply if the document under attack is incomplete, unclear, or ambiguous. See *Precision Anodizing & Plating*, 244 NLRB 846, 857 (1979).

⁸*Pennypower Shopping News*, 253 NLRB 85 (1980), enfd. 726 F.2d 626 (10th Cir. 1984).

several issues besides a bonus; for example, termination date of the new labor agreement, health insurance for dependents and hourly pay raises were all agreed to. Yet none of this was brought to the attention of employees on the notice. Only the so-called "signing bonus" was highlighted and the terminology was concededly wrong. Because Respondent has not credibly shown a justification for its requirement that strikers actually work for the week of June 1 through 8, I find that Respondent violated Section 8(a)(1) of the Act by posting the notice at a time when it knew the Union was about to go on strike.

General Counsel also contends that by failing to pay the bonus to strikers, Respondent violated Section 8(a)(3) of the Act. I agree.

In *NLRB v. Great Dane Trailers*, 388 U.S. 26, 34 (1967), the U.S. Supreme Court has set out a relevant test to determine whether discriminatory conduct constitutes an unfair labor practice:

First, if it can reasonably be concluded that the employer's discriminatory conduct was "inherently destructive" of important employee rights, no proof of an antiunion motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations. Second, if the adverse effect of the discriminatory conduct on employee rights is "comparatively slight," an antiunion motivation must be proved to sustain the charge if the employer has come forward with evidence of legitimate and substantial business justifications for the conduct. Thus, in either situation, once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to some extent, the burden is upon the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him.

Various courts and Board decisions have applied the *Great Dane Trailers* principles recited above in various cases which apply to the instant case. For example, *Soule Glass Co. v. NLRB*, 652 F.2d 1055 (1st Cir. 1981) (a 25-cent-per-hour wage increase to employees working as of the first day of a strike was an unfair labor practice); *NLRB v. Swedish Hospital Medical Center*, 619 F.2d 33 (9th Cir. 1980) (granting a 1-day vacation to nonstrikers, those who returned early and those hired during the strike was an unfair labor practice); *NLRB v. Frick Co.*, 397 F.2d 956 (3d Cir. 1968) (refusing vacation pay to strikers while paying nonstrikers was an unfair labor practice.); *Aero-Motive Mfg. Co.*, 195 NLRB 790 (1972), *enfd.* 475 F.2d 27 (6th Cir. 1973) (\$100 bonus to those who worked through a strike, not awarded or announced until after the strike was an unfair labor practice).

In light of the above authorities, and having found no credible business justification for payment of the bonus to nonstrikers, I find that Respondent has violated Section 8(a)(3) of the Act by withholding the bonus from those who elected to strike. See *Electro Vector*, 220 NLRB 445 (1975).

2. The strike, unfair labor practice or economic⁹

In *Mohawk Liqueur Co.*, 300 NLRB 1075, 1085 (1990), the administrative law judge set forth basic legal principles which apply to this portion of the decision:

An unfair labor practice strike is one which is precipitated in whole or in part by an unfair labor practice. A strike which starts out in support of economic objectives may become an unfair labor practice strike if an employer commits an intervening unfair labor practice which is found to have prolonged the strike or "is likely to have significantly interrupted or burdened the course of the bargaining process." *C-Line Express*, 292 NLRB 638 (1989). The Board and the courts consistently have required that the unlawful conduct be a factor (not necessarily the sole or predominant one) which caused or prolonged the work stoppage, but a causal connection is not established by a mere coincidence in time. *Tufts Bros.*, 235 NLRB 808, 810 (1978); *Reichhold Chemicals* 288 NLRB 69 (1988).

Certain types of unfair labor practices by their nature will have a reasonable tendency to prolong the strike and therefore afford a sufficient and independent basis for finding conversion The common threat running through these cases is the judgment of the Board that the employer's conduct is likely to have significantly interrupted or burdened the course of the bargaining process. [*C-Line Express*, *supra*.]

In the instant case, Respondent committed an unfair labor practice by posting a notice relative to a bonus to be paid only to those who worked during a week when a strike was in progress and by paying the bonus to nonstrikers only. To seek further guidance in finding a causal link, if any there be, between the unfair labor practices and the strike, I turn again to *C-Line Express*, *supra*.

In *C-Line Express*, *supra*, the Board disagreed with the administrative law judge who found that certain unfair labor practices converted the economic strike into an unfair labor practice strike. In discussing what is in some cases, an elusive causal link, the Board noted a decision of the First Circuit Court of Appeals in *Soule Glass Co. v. NLRB*, *supra*, which aptly observed, that the search for a causal link is often problematic, leading the Board to rely on both objective and subjective considerations:

Applying objective criteria, the Board and reviewing court may properly consider the probable impact of the type of unfair labor practice in question on reasonable strikers in the relevant context. Applying subjective criteria, the Board and court may give substantial weight to the strikers' own characterization of their motive for continuing to strike after the unfair labor practice However, in examining the union's characterization of

⁹ At p. 12, fn. 1 of its brief, the Union represents that on December 9, the Union ended its strike and made an unconditional offer to return to work on behalf of striking employees. I need not determine the accuracy of this statement because if a reinstatement remedy is appropriate in this case, it will not be subject to challenge even where the strikers had not yet offered to return to work. *North American Coal Corp.*, 289 NLRB 788 (1988).

the purpose of the strike, the Board and the court must be wary of self-serving rhetoric of sophisticated union officials and members inconsistent with the true factual context. [652 F.2d 1055 at 1080 (1st Cir. 1980).]

In light of the above, I find in this case in agreement with General Counsel (Br. p. 17) that initially the strike was an economic strike. However, I need not determine whether the contract would have been approved but for the conduct of Bernard. As I noted in my decision approving settlement (JD(SF)-8-91), the Board does not recognize the unclean hand defense. *Roofers Local 81 (Beck Roofing)*, 294 NLRB 285 (1989), enfd. 915 F.2d 508 (9th Cir. 1990). Both union witnesses Motta and Boca testified that the tentative agreement was rejected because of dissatisfaction with economic aspects. I also find that the vote to reject the tentative agreement was tantamount to a strike vote. Prior to the vote on May 31, Bernard explained to employees that if they voted down the proposal there was the possibility of a strike, and if employees intended to cross the picket line, they should vote to accept the contract (Tr. p. 57).¹⁰

It is true that in accord with Union Official Macrae's order, after he learned of the posted notice, strikers wrote "Unfair Labor Practice" on the picket signs. Yet this is exactly the type of self-serving rhetoric which the Board referred to in *C-Line Express* above. I am more impressed with the statements of union agent Vanhorn made to local media on the first day of the strike complaining about Respondent's wage offer and change of the new agreements expiration date to March. Vanhorn said, "That's why the contract was turned down." No mention was made of the bonus. Indeed, as she spoke to employees before the ratification vote, Bernard almost forgot to mention the bonus until someone reminded her to do so. This does not show even partial causation to me. I turn to decide whether the economic strike was at some later point converted to an unfair labor practice strike.

Here again, I note that time after time the strikers were advised by union leaders and union attorneys to publicly proclaim the unfair labor practice aspect of the strike. Regular meetings were held at which Respondent's unfair labor practice were discussed. Strikers even passed a resolution which supposedly affirmed the unfair labor practice aspect of the strike (G.C. Exh. 7). However, during July, the Union prepared a draft of a handbill explaining the strike to the public (R. Exh. 1). This handbill, failing to mention any alleged unfair labor practices as motivation for the strike, had little or no public distribution. Subsequently, union officials decided that the draft did not adequately convey the strikers' position. Accordingly, a second draft was prepared and distributed in which the Union intertwined claims of unfair labor practices with their economic demands (U. Exh. 2).

In reviewing all the evidence on this issue, I note certain correspondence between the parties. On June 1, Pepe wrote to the Union complaining about Bernard's role in rejection

of the contract (U. Exh. 1). On June 11, Blaylock wrote back to Pepe as follows:

June 11, 1990

Stephen P. Pepe
O'Melveny & Meyers
400 South Hope Street
Los Angeles, California 90071-2899

Dear Stephen:

I finally received your letter of June 1, 1990. A week late because of being sent to the wrong address.

I was surprised at the accusations in your letter, because Linda told me that she did recommend ratification, just as our agreement spelled out. She also told the people that if they chose not to accept the Company's offer they would most likely be on strike.

After further investigation and talking to most all of the crew, I have found that Linda did exactly as she had told me. This did not surprise me in the least, because I have quite often found, that people who live in a democratic society refusing to accept the will of the majority will betray their fellow human beings for their own self gain. Sometimes people like that only hear what they want, especially if they are drinking and only partially attend the meeting. Making accusations and leveling written charges based on their testimony is ridiculous. I believe that giving credibility [sic] to their statements makes you morally compatible to them. For you to use the word integrity compares to Hitler using the word compassion.

While talking to the crew, I discovered the real reasons the contract was not ratified. I find it unfortunate that your obnoxious, belligerent go to hell attitude at the bargaining table combined with your filthy language was one of the contributing factors that led to this dispute between the Company and their employees.

The combination of your attitude and rigid stance on the contract expiration date of March 1st, with 0 hourly wage increase in 1990, and meager increases in 1991 and 1992 has convinced these workers they will continue to be unable to provide medical care coverage for their wives and children and fall even further behind in their struggle to make ends meet.

Now that you know the real reason for this dispute, I hope you will be willing to sit down and sincerely work toward resolving these problems.

We are willing to meet and work towards this goal as often and as long as you desire.

Although we do not like confrontation, if we cannot resolve our differences, the I.W.A.-U.S., will put every available resource we have into this effort.

Sincerely,

/s/ Glenn Blaylock
Glenn Blaylock
[Emp. Exh. 2.]

¹⁰ A separate strike vote was never taken.

Then on June 19, Blaylock wrote again to Pepe:

June 19, 1990

Mr. Stephen P. Pepe
O'Mellveny & Meyers
400 South Hope Street
Los Angeles, CA 90071-2899

Re: Kimtruss-Madera, California

Dear Stephen,

In your letter of June 14th you stated that we were dishonest because we did not sell the contract to the Kimtruss employees. Linda Bernard and I gave the employees all the facts and information as truthfully and correctly as we could. The employees voted and rejected your offers on both occasions, even in awareness of your threats of losing their jobs.

My letter of June 11th was intended to make you aware of the concerns of the crew as they were told to me. In giving you this information I had hoped we could work positively to resolve these issues and get the people back to work. When you are ready to do this we will be happy to meet with you.

You told us that you had given as much as you had authority to give and we recommended it as the best we could bargain. I don't see anything dishonest in that. In order to sell your proposal we would have had to be dishonest. If you are not happy with the way Linda or I do our job then I would suggest you contact the National Union President as that is who I work for not you. His name is Wilson "Bill" Hubbell and can be reached at 503-656-1475.

Sincerely,

/s/ Glenn Blaylock
Glenn Blaylock

[U. Exh. 3.]

None of these letters referred to any unfair labor practice as motivation for the strike.

The Union places great reliance on the case of *Teamsters Local 515 v. NLRB*, 906 F.2d 719 (D.C. Cir. 1990), which held in pertinent part,

the employees followed their Union leader's recommendation to strike, in part because of his view that the provisions of the no-strike clause were outrageous. In so voting, the employees ratified the Union leader's judgment that they should strike because of the [Respondent's] demand for a no-access provision.

Thereafter, in *Reichhold Chemicals*, 301 NLRB 706 (1991), the Board accepted the remand from the court of appeals. The Board then held as the law of the case that an unfair labor practice had been a contributing cause of the strike and that the strike was an unfair labor practice strike. The Board's holding as the law of the case is required by the decision of the U.S. Court of Appeals for the D.C. Circuit remanding the case. When there is conflict between a Board holding and a decision of the court of appeals, I am bound to observe the Board's decision. *Iowa Beef Packers*, 144 NLRB 615 (1963). Accordingly, I find that the decision of the Board in *C-Line Express* is more pertinent to the instant case.

I conclude that General Counsel did not sustain her burden of showing a causal nexus between Respondent's unfair labor practices and the continuation of the strike. I reject the Union's repeated self-serving characterizations of the strike as inconsistent with the true factual content. I also find that the unfair labor practices found in this case are not of a type discussed by the Board in *C-Line Express*, supra, which by their nature will have a reasonable tendency to prolong the strike and therefore afford a sufficient and independent basis for finding conversion, e.g., unlawful withdrawal of recognition.

I further conclude that if the strikers unconditionally offered to return to work some time after the record closed, they are economic rather than unfair labor practice strikers. Accordingly, they are entitled to immediate reinstatement only if they had not been permanently replaced by Respondent.¹¹

CONCLUSIONS OF LAW

1. At all pertinent times, Kimtruss Corporation was an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. At all pertinent times, International Woodworkers of America, Local 3-433, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. By posting a notice to employees on May 31, stating in part, that "all employees not working June 1, 1990 through June 8, 1990 will not be paid the signing bonus," after Respondent learned employees planned to strike the following day, where the terms of said notice had not been part of Respondent's last and final proposal which it implemented after employees failed to ratify the tentative agreement, Respondent violated Section 8(a)(1) of the Act.

4. By denying the bonus referred to in par. 3 above to the striking employees while paying same to nonstrikers who worked during the period in issue, Respondent violated Section 8(a)(3) of the Act.

5. The strike which began on June 1 was and remained an economic strike.

REMEDY

Having found that Respondent has violated Section 8(a)(1) and (3) of the Act, I shall recommend that it be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

It is further recommended that Respondent be ordered to cure its unlawful discrimination by restoring to eligibility for the 1990 bonuses those persons disqualified because of strike-related absence.

Persons entitled to receive bonus payments may be identified in the compliance phase of this proceeding. *Electro Vector*, 220 NLRB at 448 fn. 5. Interest on the bonus payments shall be computed as required by *New Horizons for the Retarded*, 283 NLRB 1173 (1987). See generally *Isis Plumbing Co.*, 130 NLRB 116 (1962).

[Recommended Order omitted from publication.]

¹¹ *Laidlaw Corp.*, 171 NLRB 1366 (1968), enf'd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970).